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APPLICABILITY OF NEPA TO FEDERAL GRAZING ACTIONS

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INTRODUCTION

There have been several bills before the 104th Congress to revise the grazing programs of the Bureau of Land Management (BLM) and the Forest Service (FS). One issue that has been controversial is whether and how to modify the applicability of the National Environmental Policy Act (NEPA) to grazing decisions and activities of those agencies. This report discusses how NEPA currently applies to BLM and FS in the grazing context. NEPA applies to all federal activities, but may result in a gradation of federal responses and documentation and depending on the extent of potential environmental effects involved. Current proposed language also will be discussed.

NEPA IN GENERAL

Except as otherwise provided by Congress, NEPA applies to *all* federal actions. NEPA imposes several obligations on federal agencies in addition to the familiar (and most readily enforceable) requirement to prepare Environmental Impact Statements (EISs) in certain circumstances.¹ NEPA makes it the:

continuing responsibility of the Federal government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

§4331(b)(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

¹ Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. §4321 *et seq.*

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(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

NEPA requires all federal agencies to do certain things, including the preparation of an EIS for any major federal action significantly affecting the quality of the human environment. There are other duties, however, some of which may be relevant to current legislative proposals:

\$4332(2)(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment; ...

(C) include in every recommendation or report on proposals for legislation and other major Federal Actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented ...

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; ...

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects;

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As will be discussed, this §4332(2)(E) duty to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources, may be particularly relevant in the current legislative context.

NEPA also created the Council on Environmental Quality (CEQ), which promulgated regulations implementing NEPA.² The CEQ regulations emphasize communicating with the public, reducing delays, and making better decisions, rather than producing unnecessary paperwork.³ The regulations delineate various levels of environmental review of possible environmental effects, depending on the circumstances and likely degree of environmental impacts.

At one end of the spectrum are major federal actions that will significantly affect the environment for which EISs are prepared.⁴ At the other end of the spectrum are activities that either separately or cumulatively have only minor environmental effects. These are excused from preparation of any NEPA environmental analysis at all as "categorical exclusions."⁵ Both the BLM and FS have established criteria for determining whether particular actions or decisions may be regarded as categorical exclusions.

An Environmental Assessment (EA) is prepared for an action that is not clearly a categorical exclusion, nor clearly requires an EIS. Based on the EA, the agency either prepares an EIS if warranted, or issues a "Finding of No Significant Impact" (FONSI).

Although the principal function of an EA is to evaluate whether an EIS is necessary, the CEQ regulations recognize that agencies may also prepare an EA on any action at any time in order to assist agency planning and decisionmaking.⁶ In contrast to the mandatory nature of EA preparation to determine whether an EIS is necessary, note that the CEQ regulation on EAs that aid decision making is worded permissively -- i.e., the agencies may or may not perform an EA -- a fact that may be significant in the circumstances where an EIS is statutorily precluded, as will be discussed below.

² 40 C.F.R. §1500 *et seq.*

³ 40 C.F.R. §1500.1 through 1500.5.

⁴ 43 C.F.R. §1501.4, and parts 1502 and 1503.

⁵ 40 C.F.R. §1508.4.

⁶ 40 C.F.R. §1501.3.

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No CEQ regulation specifically addresses the circumstance when Congress has precluded preparation of an EIS, and we are advised that CEQ has not rendered informal advice on this issue.⁷

The CEQ regulations also specify public involvement in agency NEPA processes. Agencies must:

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.⁸

The CEQ regulations specify levels of notice to the public depending on whether an action is of national or local interest and state that in all cases the agency must mail notice to those who requested it on an individual action.⁹

Each agency was expected to elaborate on how to comply with NEPA in the context of its own duties. The details of agency NEPA compliance in the grazing context vary somewhat for BLM and FS, as discussed below.

NEPA IN THE GRAZING CONTEXT

As a general matter, all of the body of NEPA interpretation applies to agency management of grazing on the federal lands. However, there have been few cases to date specifically analyzing agency NEPA duties in the grazing context. *Natural Resources Defense Council v. Morton*, held that a single EIS for the entire grazing program of the Department of the Interior was not adequate compliance with NEPA and did not provide the "detailed analysis of local geographic conditions necessary for the decision-maker to determine what course of action is appropriate under the circumstances."¹⁰ Some assessment of environmental impacts of particular permits or groups of permits is necessary, although not an EIS for each.¹¹ Similarly, a decision to complete only an EA on significant grazing regulations also was found to be inadequate.¹²

⁷ Personal conversation with CEQ representative, August 21, 1996.

⁸ 40 C.F.R. §1506.6.

⁹ *Ibid.*

¹⁰ 388 F. Supp. 829 (D.D.C. 1974), *affirmed* 527 F. 2d 1386 (D.C.Cir. 1976), *cert. denied sub nom* Pacific Legal Foundation, v. Natural Resources Defense Council, 427 U.S. 913 (1976).

¹¹ *Id.*, at 841.

¹² *Natural Resources Defense Council v. Hodel*, 618 F. Supp. 848 (E.D. Cal. 1985).

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On the other hand, a court held that an EIS need not include specific discussion of near and long term stocking rates for each alternative and each allotment covered by the EIS and that BLM did not necessarily have to consider the no-grazing alternative.¹³

The BLM and FS each have adopted agency NEPA guidance specific to the grazing context.

Bureau of Land Management

BLM has integrated its NEPA duties with its other statutory duties. For example, the Federal Land Policy Management Act (FLPMA) establishes the policy that the discretionary authority of the Secretary in managing the public lands will be conducted "after considering the views of the general public; ..." ¹⁴ Also, the public and state and local officials must be notified and have meaningful involvement in the development of land use plans, programs, and "land use decisions."¹⁵

BLM-NEPA guidance begins with general guidance at the Department level and continues in the BLM Manual and BLM NEPA Handbook.

The DOI Departmental Manual lists the following criteria for categorical exclusions:

- (a) The action or group of actions would have no significant effect on the quality of the human environment; and
- (b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources.¹⁶

The first criteria indicates that the action would not have significant environmental effects that would require preparation of an EIS. As will be discussed, the additional guidance in the Appendixes and elsewhere indicate when intermediate analysis, such as preparation of an EA, might be required for activities between significant impact situations and categorical exclusions.

The second criteria states that the action would not involve unresolved conflicts concerning alternative use of available resources. This is the language

¹³ Natural Resources Defense Council v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985), *affirmed*, 819 F. 2d 927 (9th Cir. 1987). The court declined to become a "rangemaster", and opined that the problems noted by plaintiffs stemmed from the fact that Congress had been so broad in the relevant statutes on rangeland management that judicial enforcement was difficult.

¹⁴ 43 U.S.C. 1701(a)(5).

¹⁵ 43 U.S.C. §1712(c)(9).

¹⁶ The Department of the Interior Departmental Manual, §2.3A(1).

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used in §4332(2)(E) [§102(2)(E)] of NEPA to indicate when an agency has a duty to consider alternatives to its proposed action. As will be discussed later in this report, this duty may exist independent of the duty under §4332(2)(C) to prepare an EIS, but how exactly an agency must meet this obligation is far from clear.

Other DOI guidance elaborates on categorical exclusions and intermediate NEPA compliance. Appendix I to the DOI Departmental Manual lists general types of actions that are categorical exclusions department-wide. For example, paragraph 1.6 of the list of general categorical exclusions lists non-destructive data collection, inventory, study, research and monitoring activities. Paragraph 1.7 lists routine and continuing government business, including supervision, operation. Paragraph 1.11 lists informational or consultative activities.

Appendix I also states that environmental documents (either an EA or EIS) will be prepared for individual actions if the any of the exceptions to categorical exclusions in Appendix 2 apply.

Appendix 2 states that environmental documents must be prepared for actions otherwise within a categorical exclusion if the action may have any of the results listed. These include: indications of potentially significant environmental effects or other factors are present; if the environmental effects are highly uncertain; if the action is related to other actions that are individually insignificant but cumulatively significant; if the action would have adverse effects on species listed or proposed to be listed under the ESA; and in other listed circumstances. (*Id.*, Appendix 2, Ch. 2.)

In addition, Appendix 5 to the Departmental guidance¹⁷ applies to BLM and elaborates on what BLM actions can generally be regarded as being categorically excluded from NEPA analysis and documentation. These include subsection "D" on Rangeland Management, which reads as follows:

- (1) Approval of transfers of grazing preference.
- (2) Placement and use of temporary (not to exceed one month) portable corrals and water troughs, providing no new road construction is needed.
- (3) Temporary emergency feeding of livestock or wild horses and burros during periods of extreme adverse weather conditions.
- (4) Removal of wild horses or burros from private lands at the request of the landowner.
- (5) Processing (transporting, sorting, providing veterinary care to, vaccinating, testing for communicable diseases,

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training, gelding, marketing, maintaining, feeding, and trimming of hooves of) excess wild horses and burros.

(6) Approval of the adoption of healthy, excess wild horses and burros.

(7) Actions required to ensure compliance with the terms of Private Maintenance and Care Agreements.

(8) Issuance of title to adopted wild horses and burros.

(9) Destroying old, sick, and lame wild horses and burros as an act of mercy.

Other subsections of Appendix 5 relate to Wildlife and "Other" activities that may also apply in the rangeland context. In addition, general regulations, such as those related to other occupancy and use, rights of way, mineral access, and protection of historic and cultural programs may also be relevant to grazing-related decisions and actions.

The Departmental Manual in chapter 3, §3.2 tracks the CEQ regulations and states that an EA "will" be prepared:

A. ... for all actions, except those covered by a categorical exclusion, covered sufficiently by an earlier environmental document, or for those actions for which a decision has already been made to prepare an EIS. The purpose of such an EA is to allow the responsible official to determine whether to prepare an EIS.

In contrast, an EA "may" be prepared on any action at any time in order to assist in planning and decisionmaking. Under §3.3, public notification must be provided and, where appropriate, the public involved in the EA process. (See also CEQ regulation 40 C.F.R. §1501.7).

Therefore, it appears that under DOI guidance, preparation of an EA is optional when an EIS is statutorily not required.

The separate BLM Manual part 1790 contains general NEPA authorities and refers to the BLM-NEPA Handbook (H-1790).

Under the BLM NEPA Handbook, BLM "must" prepare an EA for an action that (1) is not exempt from NEPA; (2) not within a categorical exclusion; (3) not covered in an existing Plan EIS or other environmental analysis; or (4) does not normally or obviously require an EIS.¹⁸ The EA can serve various purposes, some of which incorporate agency duties under FLPMA. Under other sections of the BLM Handbook, an EA is to be prepared when offering permits and leases

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for areas not previously grazed by livestock and when significant modifications to the previously authorized grazing use are proposed.¹⁹ An EA may be prepared for actions to be included in an AMP (including range improvements).²⁰

Note that BLM is to prepare an EA for a grazing-related action that is not within a categorical exclusion, but that does not normally or obviously require an EIS. When considering the scope of such an EA, the responsible BLM employee is to consider whether there are any:

unresolved conflicts concerning alternative uses of resources (See Section 102(2)(e) (sic) of NEPA)? If so, what alternatives should be considered? Are there reasonable alternatives for satisfying the need for the proposed action? Will such alternatives have meaningful differences in environmental effects? Should they be considered?²¹

The part of Appendix III of the Handbook reserved for additional BLM categorical exclusions beyond those set out in the Departmental guidance, is currently reserved "pending revision." We are advised by a representative of BLM that this revision may be completed in 6 months. *Proposed* categorical exclusions include:

- a. Approval of transfers of livestock grazing preference.
- b. Placement and use of temporary (not to exceed one month) portable corrals and water troughs where no new access is needed.
- c. Temporary emergency feeding of livestock or wild horses and burros from private lands at the request of the landowner.
- d. Installation of routine signs, markers, culverts, ditches, waterbars, gates, or cattleguards on/or adjacent to existing roads.
- e. Acquisition of existing water developments (e.g. wells and springs) on public land.
- f. Construction of small protective enclosures including those to protect reservoirs and springs and those to protect small study areas.

Note that despite the discretionary wording of NEPA Departmental and CEQ guidance, under the BLM guidance, an EA "must" be prepared under circumstances that might apply even if an EIS is not required, and an EA should consider alternatives and hence fulfill any agency duty under §102(2)(E) of NEPA. However, the Handbook also says that "In the case of any apparent discrepancies, the CEQ Regulations or Departmental Manual shall govern."²²

¹⁹ H-4130-1 - Authorizing Grazing Use.

²⁰ H-4120-1 - Grazing Management.

²¹ H-1790-1 - NEPA Handbook, at IV-3.

²² Handbook, 1790-1.08.

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If the Departmental Manual applies as to whether an EA is required to be prepared, then it appears that under current agency guidance, preparation of an EA is optional in situations other than when the EA is prepared to decide if an EIS is needed. It must also be noted that most of the NEPA guidance is not contained in agency *regulations*, and therefore is not binding on the agency to the same extent that regulations are. Furthermore, all agency guidance, of course, is subject to change.

Forest Service

The regulations of the Department of Agriculture set out the NEPA policies for the Department as a whole:

... (b) [a]ll policies and programs of the various USDA agencies shall be planned, developed, and implemented so as to achieve the goals and to follow the procedures declared by NEPA in order to assure responsible stewardship of the environment for present and future generations.

(c) Each USDA agency is responsible for compliance with this part, the regulations of CEQ, and NEPA. Compliance will include the preparation and implementation of specific procedures and processes relating to the programs and activities of the individual agency, as necessary.

(d) The Under Secretary, Natural Resources and Environment (NR&E), is responsible for ensuring that agency implementing procedures are consistent with CEQs NEPA regulations and for coordinating NEPA compliance for the Department (7 CFR 2.19(b)). The Under Secretary, NR&E, through the Agricultural Council on Environmental Quality, will develop the necessary processes to be used by the Office of the Secretary in reviewing, implementing, and planning its NEPA activities, determinations, and policies.²³

Departmental categorical exclusions also are set out, which exclude certain actions from the preparation of Eas and EISs "unless individual agency procedures prescribed otherwise." Departmental categorical exclusions that might relate to grazing activities include: inventories, research activities, and studies; and civil and criminal law enforcement and investigative activities.²⁴

In addition, Department of Agriculture agencies are charged with identifying in their own procedures activities which normally would not require

²³ 7 C.F.R. §1b2.

²⁴ 7 C.F.R. 1b.3(a).

